Supreme Court, U.S.
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No. 99-1038

IN THE
Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the courts below properly applied the standards contained in *United Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987), in determining that the recognized public policy against the performance of safety sensitive jobs while impaired was not violated in affirming an arbitration award reinstating an employee who tested positive for cannabinoids in a randomly scheduled drug test.

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STATEMENT OF THE CASE

The United Mine Workers of America ("UMWA") and Eastern Associated ("EACC") are parties to a collective bargaining agreement. The agreement includes a grievance and arbitration procedure and the requirement that no employee may be disciplined or discharged, except for "just cause".[1]

EACC implemented a Drug and Alcohol Policy ("Policy"). Consistent with Department of Transportation ("DOT") regulations, the Policy includes random drug testing for its Mobile Equipment Operators ("MEO"). James Smith, a MEO, was subjected to random drug testing. He tested positive for cannabinoids on March 26, 1996. EACC discharged Smith, and the UMWA filed a grievance that went to arbitration. After a hearing at which both sides adduced evidence, the arbitrator issued an award reducing the penalty from discharge to a 30-day suspension, without pay, and requiring that Smith both participate in a substance abuse program and submit to

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[1] Article XXIV, Section (a) of the parties' collective bargaining agreement provides:

> No employee covered by this Agreement may be disciplined or discharged except for just cause. The burden shall be on the Employer to establish grounds for discharge in all proceedings under this Agreement.

random testing that either EACC or an approved substance abuse professional would request during the next five years. Smith took four random drug tests over the ensuing nine months, and tested negative in each instance.[2] On his fifth test, however, on June 27, 1997, he tested positive for cannabinoids. He was never accused of possessing or being under the influence of drugs while working for EACC.

EACC dismissed Smith, and the Union grieved. The matter was submitted to Arbitrator Jerome T. Barrett for resolution, and his decision gives rise to the instant dispute. He was asked to resolve the issues of: whether the June 1997 dismissal was for just cause, and if not, what constitutes an appropriate remedy? Pet. App. at 8a. After conducting an evidentiary hearing, Arbitrator Barrett found there was just cause to discipline Smith, but not to discharge him. Pet. App. at 10a-11a.

EACC sought to vacate Arbitrator Barrett's decision and the Union cross-petitioned to enforce it in the United States District Court for the Southern District of West Virginia. On summary judgment, the district court enforced the decision. In so doing, Judge Copenhaver

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[2] The district court recited the dates of three random drug tests for which Smith tested negative. Pet. App. at 7a. The arbitrator's recitation of the facts, however, revealed that Smith produced negative results in four random drug tests. Pet. App. at 26a.

found that the arbitrator's decision was "rationally inferable" from the collective bargaining agreement. Pet. App. at 16a. The court rejected EACC's effort to set aside the award on public policy grounds. It found that while there exists "a well-defined and dominant public policy ... against the use of controlled substances by those who perform safety sensitive jobs", there was no need to vacate the award because the applicable DOT regulations "do not express an explicit, well-defined public policy permanently enjoining the employment of commercial motor vehicle drivers who test positive for drug use. Specifically, the Department of Transportation regulations do not require that employees who test positive for drug use be automatically discharged." Pet. App. at 20a. The court thus concluded that the arbitrator's award was consistent with the DOT regulations. In addition, the court recognized Arbitrator Barrett's interpretation of the collective bargaining agreement's substance abuse policy "to allow for suspension and discipline ... and does not call for mandatory discharge". Pet. App. at 16a. In upholding the award, the court acknowledged the First Circuit's position that an employee's positive test, alone, can be sufficient to deny reinstatement even if the employee is not shown to be under the influence of drugs while at work. The court disagreed, however, that public policy automatically mandates the discharge of employees who test positive. Contrary to the petition for a writ of certiorari, the district court did <u>not</u> determine "that an award is contrary to public policy only when it would require illegal conduct on the part of the employer". Pet.

at 3.

On review, a panel consisting of Judges Widener, Ervin and Wilkins determined that the district court correctly decided the issues before it. The Fourth Circuit thus affirmed the district court's ruling in a *per curiam* decision. The Fourth Circuit subsequently denied EACC's petition for rehearing and rehearing *en banc*.

CERTIORARI IS NOT WARRANTED

In its petition, EACC invites the Court to reexamine an area of settled federal labor law under the guise of an ostensible fracture among the lower courts. Seizing on a variance in the outcome of several cases involving challenges to labor arbitration awards on grounds of violation of public policy, EACC posits that an irreconcilable conflict exists below that compels this Court to accept review. However, there is no disagreement among the courts on the pertinent issue of public policy. Indeed, the courts have consistently recognized the public policy against the performance of safety sensitive jobs by those impaired by drugs. Moreover, although the outcomes in particular cases may differ, the decisions below reflect the normal variance manifest in the rulings of the federal courts uniformly applying the teachings of this Court. All of the circuit courts recognize the controlling standards articulated by this Court in *United Paperworkers v. Misco, Inc.,* 484 U.S. 29 (1987), as well as the continued vitality of the principles embraced in that

ruling. As we show below, the fact of differing results obtained in the courts below does not warrant review by this Court.

A. Labor Arbitration is the Established Mechanism Designed to Avoid Labor Strife.

In order to place the pending request for review in the appropriate context, it is necessary to revisit the policies animating the system of labor relations created by Congress. The promotion of industrial peace through collective bargaining is the fundamental congressional policy that lies at the heart of federal labor law. *Phelps Dodge Corp v. National Labor Relations Board*, 313 U.S. 177, 185 (1941) (Fundamental principle of federal labor legislation is "attainment of industrial peace."); *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 455 (1957) ("Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike... federal courts should enforce these agreements... and industrial peace can be best obtained only in that way"); *International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959)("the goal of federal labor policy... is... to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and to thereby minimize industrial strife").

Having formulated a national policy promoting

collective bargaining, Congress was cognizant of the fact that this process does not conclude upon the completion of contract negotiations. Instead, Congress recognized that disputes arising during the administration of labor contracts were inevitable and that such disputes could potentially lead to strikes, slowdowns or lockouts. *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 249 (1970). In order to avoid labor strife, Congress weaved into the fabric of national labor policy the promotion of "arbitral process as a substitute for economic warfare." *Teamsters Union Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962). This policy was made express in Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173 (d) . It provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." As this Court noted in *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578 (1960), "[a] major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement....[A]rbitration is substitute for industrial strife....[and] is part and parcel of the collective bargaining process itself." *See also United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (stating that arbitrators serve "as indispensable agencies in [the] continuous collective bargaining process").

Encouragement of arbitration is, therefore, a central

theme of national labor policy, as it allows labor disputes to be resolved under the "rule of law" rather than "leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment of the contending forces." *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 580 (1960). Thus, unlike commercial arbitration that is grounded in a policy of litigation avoidance, *id.* at 578, labor arbitration is intended to preclude workplace unrest and strife. *Id.* at 578, 580.

In order to effectuate this national labor policy of private dispute resolution, the role of the federal judiciary has been circumscribed. In keeping with the broad deference accorded arbitration rulings, this Court has instructed that as long as an arbitration award "draws its essence from the collective bargaining agreement," a reviewing court must enforce the ruling. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). In this regard, the Court is mindful of the fact that "[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Id.* at 599. *See W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 764 (1983). Such determination does not allow review of the merits of such rulings. Instead, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced

he committed serious error does not suffice to overturn his decision." *United Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Similarly, the remedies crafted by an arbitrator to cure contract violations are entitled to the same degree of judicial deference as the arbitrator's factual findings and contract interpretations. "[W]here it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined." *Misco*, 484 U.S. at 38.

B. The Public Policy Exception to Arbitral Finality is Narrowly Construed

Although this Court has embraced and protected the deference accorded labor arbitral rulings and remedies, it has recognized that a labor agreement may violate tenets of public policy and that, as such, it may not be enforced regardless of an arbitration award. The tension between these competing interests was examined in *W.R. Grace* and again in *Misco*. In *W.R. Grace*, this Court recognized the major premise that a court may refuse to enforce an agreement or award that violates public policy. It also took pains, however, to emphasize that it did not envision or sanction a judicial mechanism whereby courts could intrude upon the labor arbitration system under "general considerations of public interests". 461 U.S. at 766,

(quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)). This policy was subsequently reexamined and reaffirmed in *Misco*.

Indeed, in *Misco*, the Court explained that *W. R. Grace* established that the judiciary could properly vacate a labor arbitration award only if the "specific terms contained in [the parties'] agreement violate public policy". *Misco*, 484 U.S. at 43. *Misco* involved an arbitration award reinstating an employee even though he worked on a dangerous machine and had been found on company property in a car with a burning marijuana cigarette. *Id.* at 33-34. The company sought to vacate the arbitration award on several grounds, including that to reinstate an employee who had possessed marijuana on company property was contrary to public policy. *Id.* at 34. The district court found merit to the public policy concerns and vacated the arbitrator's decision. *Id.* at 34-35. The court of appeals affirmed, ruling that reinstatement would violate the public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol." *Id.* at 35, (quoting 768 F.2d 739, 743 (5th Cir. 1985)).

This Court granted review in *Misco* because the lower courts were divided at that time about when arbitration decisions could properly be set aside based on public policy concerns. In reversing the court of appeals, this Court expressly did not "sanction a broad judicial power to set aside arbitration awards as against public

policy." *Misco,* 484 U.S. at 43. Rather, when asked to vacate labor arbitration decisions based on public policy concerns, it directed that lower courts determine if the public policy at issue is "well-defined and dominant," *id.* at 44, and, if so, the "violation of such a policy must be clearly shown if an award is not to be enforced." *Id.* at 43. In *Misco*, the Court found that the court of appeals had not properly set out the public policy at issue. "The Court of Appeals made no attempt to review existing laws and legal precedents in order to determine that they establish a "well-defined and dominant" policy against the operation of dangerous machinery while under the influence of drugs". *Id.* at 44. This Court further stated that irrespective of whether the public policy was properly identified, no violation was "clearly shown". *Id.* Moreover, the unanimous Court reiterated the well-established precept that a court is not at liberty to overturn an arbitration award if it disagrees with the arbitrator's factual findings, even if the court believes the factual findings to be "improvident" or "silly". 484 U.S. at 39.

C. Post-*Misco* Cases Do Not Reflect an Irreconcilable Split

Since this Court's ruling in *Misco* thirteen years ago, both employers and labor organizations have sought judicial review of hundreds of labor arbitration awards. For the most part, the courts have experienced little difficulty in adhering to the teachings evidenced in the *Steelworkers Trilogy* and confirmed in *Misco*.

Notwithstanding minor variations in articulation and approach, the courts have successfully rejected efforts to undermine the integrity of the arbitral process envisioned by Congress while at the same time vacating those awards that fail to "draw their essence" from the particular collective bargaining agreement. *See, e.g., General Truck Drivers Local 957 v. Dayton Newspapers, Inc.*, 190 F.3d 434, 435 (6th Cir.1999) *cert. denied*, 68 U.S.L.W. 3479 (U.S. 2000) (upholding arbitration award reinstating employee involved in workplace altercation); *American Postal Workers Union, Milwaukee Local v. Runyon*, 185 F.3d 832, 835 (7th Cir.1999) (upholding interest arbitration in favor of employer); *Rock-Tenn Co. v. United Paperworkers*, 184 F.3d 330, 336-37 (4th Cir.1999) (enforcing arbitration award binding employer to contract); *Teamsters Local 175 v. Thomas & Betts Corp.*, 183 F.3d 468, 472 (6th Cir.1999) (denying enforcement of reinstatement award violative of provisions of contract); *District 17, UMWA v. Island Creek Coal Co.*, 179 F.3d 133, 137 (4th Cir.1999) (denying effort to vacate award sustaining discharge of employee who participated in protest outside plant); *IMC-Agrico Co. v. International Chemical Workers Council, UFCW*, 171 F.3d 1322, 1325-26 (11th Cir.1999) (denying effort to vacate arbitration award); *Bureau of Engraving v. Graphic Communications International Union, Local 1B*, 164 F.3d 427, 430 (8th Cir.), *cert. denied*, 120 S. Ct. 66 (1999) (vacating arbitration awards granting monetary damages for missed overtime opportunities); *IUOE Local 351 v. Cooper Natural Resources, Inc.*,163 F.3d 916, 919-20 (5th Cir.),

cert. denied, 120 S. Ct. 45 (1999) (vacating arbitration award reinstating employee despite violation of last chance agreement); *Line Drivers Local 81 v. Roadway Express, Inc.*, 152 F.3d 1098, 1099 (9th Cir.1998) (upholding discharge arbitration awards); *Madison Hotel v. HERE Local 25*, 144 F.3d 855, 858-60 (D.C.Cir.1998) (*en banc*) (upholding award requiring employer to reinstate restaurant bus positions); *Coastal Oil of New England, Inc. v. Teamsters Local 25,* 134 F.3d 466, 469-70 (1st Cir.1998) (upholding arbitration award reinstating injured employee to first available position even if in another facility).

Within this class of cases seeking review of arbitration decisions, is a smaller group of cases in which issues of public policy have been raised as a basis for overturning arbitration awards. Once again, courts have experienced little difficulty in applying the methodology outlined in *Misco* in resolving such challenges. Not surprisingly, these decisions tend to turn on whether the court can ascertain, in the context of each particular case, whether there is an "explicit public policy" 484 U.S. at 44, that is "well defined and dominant". *Id.* If such a policy is present, the courts then consider whether the contested award contravenes that policy. *See, e.g., United Food and Commercial Workers District Local 540 v. Pilgrim's Pride*, 193 F.3d 328, 333 (5th Cir.1999) (enforcing arbitration award requiring employer to deduct certain union dues over employer's contention that it violated public policy embodied in National Labor Relations Act); *Michigan Regional Medical Center v. SEIU Local 79*, 183

F.3d 497, 504 (6th Cir.1999) (recognizing Michigan public policy of ensuring safe and competent nursing care but finding reinstatement award not to violate that policy); *Westvaco Corp. v. Paperworkers Local 676*, 171 F.3d 971, 976-77 (4th Cir.1999) (general public policy against sexual harassment is not sufficient to supplant labor arbitration of employee disciplinary sanctions).

A significantly more circumscribed group of cases involves challenges to arbitration awards in cases where an employee is implicated in some measure of drug use. The current matter lies within this area. In the instant matter, the lower courts adhered to this Court's teachings in *Misco*. Thus, the district court recited the general theory that courts have only limited jurisdiction to review labor arbitration awards under Section 301 of the Labor Management Relations Act. Pet. App. at 12a. Nevertheless, the district court recognized that courts must assure that an arbitrator's award draws "its essence from the contract", including an analysis of whether the arbitrator exceeded his contractual authority. Pet. App at. 12a-13a. The district court then applied the facts to this legal framework and expressly determined that the arbitrator's award was "rationally inferable" from the parties' collective bargaining agreement (*i.e.*, the award drew its essence from the parties' agreement, and the arbitrator did not exceed his contractual authority.) Pet. App. at 16a-17a.

The district court further considered EACC's

contention that the arbitrator's award should be set aside on public policy grounds under *Misco*. Pet. App. at 11a-21a. The district court considered EACC's articulation of the DOT Regulations which EACC asserted reflected a well-defined and dominant public policy against the operation of dangerous machinery by employees who test positive for drug use. Pet. App. at 18a-21a. While agreeing that there is a well-defined and dominant public policy against the use of controlled substances by employees who perform safety sensitive jobs, the district court found that the arbitrator's award did not contravene that policy. Pet. App. at 20a. Thus, the district court noted that the DOT Regulations EACC relied upon "do not require that employees who test positive for drug use be automatically discharged", Pet. App. at 20a-21a, and cited to the provisions of EACC's own internal policy that do not mandate termination. Pet. App. at 9a. After conducting its review of the award, the district court found that the arbitrator's award did not implicate the public policy exception. Pet. App. at 21a.

On appeal, the Fourth Circuit reviewed EACC's contention that the arbitrator's award did not draw its essence from the parties' collective bargaining agreement, and that it violated a public policy against the use of illegal drugs by those in safety-sensitive jobs. Pet. App. at 3a-4a. It noted, with approval, the district court's reasoning that a) neither the collective bargaining agreement nor the employer's substance abuse policy mandated the discharge of employees who have a positive drug test, and b) while

there is a public policy against the use of drugs by those in safety-sensitive jobs, "there is no such policy against the reinstatement of employees who have used illegal drugs in the past". Pet. App. at 3a-4a. Thus, both of the lower courts properly applied the *Misco* framework to review the arbitrator's award.

As noted by Petitioner, there is a divergence of approach among the courts of appeals in analyzing the sporadic challenges to arbitration awards involving employee discipline for drug use or failure of a drug test. Pet. at 8-17. EACC, however, overamplifies this divergence in its submission. Placing great reliance on the First Circuit's decision in *Exxon Corp. v. Esso Workers Union Inc.*, 118 F.3d 841 (1st Cir. 1997), Petitioner suggests a stark conflict among the courts of appeals. In *Exxon*, the First Circuit applied *Misco* and determined that there was a well defined and dominant public policy prohibiting employees from performing safety sensitive jobs while impaired. *Id.* at 848. Rather than a point of conflict, the First Circuit stands with virtually every other court, including the district court in this case and the alleged conflicting circuits, echoing the public concern "against the use of controlled substances by those who perform safety sensitive jobs." Pet. App. at 20a; *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201, 1205 (10th Cir. 1999) ("several courts have held that a clear public policy exists against performing safety sensitive jobs while impaired by drugs or alcohol"); *Tennessee Valley Authority v. Tennessee Valley Trades and Labor Council*,184 F.3d

510, 520 (6th Cir. 1999) (recognizing public policy against allowing impaired employees to operate vehicles); *IBEW, Local 97 v. Niagara Mohawk Corp.*, 143 F.3d 704, 718 (2d Cir.1998) ("There can be no doubt, ..., that there exists a strong public policy in favor of promoting a safe, drug free working environment in the nuclear industry); *Alvey, Inc. v. Teamsters Local 688*, 132 F.3d 1209, 1212 (8th Cir. 1997) (noting public policy of prohibiting illegal drugs in workplace). Thus there is no appreciable divergence among the courts below on this issue.

There is, however, a divergence of conclusions among the courts on whether particular arbitration awards reinstating employees violate this public policy. In *Exxon*, the First Circuit concluded that reinstatement would violate the policy irrespective of whether there was evidence of actual impairment. 118 F.3d at 850-52. In other cases cited by Petitioner, the Third Circuit has also recognized the prevalent public policy enunciated by other courts and vacated awards reinstating employees. *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 364 (3rd Cir.1993) (refusing to enforce award directing reinstatement of helmsman who tested positive for drug use after his ship ran aground); *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189 (3rd Cir.1993) (refusing to enforce award reinstating driver who reported to work inebriated).

However, when the Third Circuit considered whether it would violate public policy to reinstate an

employee who refused to take a drug test after marijuana was found in his cabin, the court found no such prohibition. *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287 (3rd Cir.1996). The court reached this different conclusion because it found Exxon had not had "just cause" to administer a drug test in the first instance. 73 F.3d at 1296. Thus, the court sanctioned the employee's refusal to submit to the drug test. *Id.* In other words, it is not simply the nexus between illegal drug use and safety-sensitive employment that the court considered, but the underlying framework that requires reference to the parties' collective bargaining agreement. *Id.* at 1295-96. *See, also, Gulf Coast Indus. Workers Union v. Exxon Corporation*, 991 F.2d 244 (5th Cir.), *cert denied*, 510 U.S. 965 (1993) (refusing to reinstate an employee who tested positive for drugs); *Tennessee Valley Authority*, 184 F. 3d at 520 ("the issue is not whether grievant's conduct violated some public policy or law, but rather the award requiring reinstatement...violated some explicit public policy"); *IBEW Local 97*, 143 F.3d at 717 ("appropriate analysis of the public policy question requires that a court focus on the outcome of the arbitrator's interpretation of the contract... whether the remedy imposed can be fairly and unequivocally shown to violate a well-established public policy").

By our count, in the thirteen years since this Court's ruling in *Misco*, there have only been approximately thirty-five appellate decisions reviewing an arbitration matter involving employee discipline due to alcohol or drug use

or failure of a test for those substances. *See Appendix*. These cases, averaging about three a year, do not reflect an intolerable schism between the courts of appeals. Indeed, the First Circuit's 1997 ruling in *Exxon* was only the second time that court had an opportunity to consider this issue and the first time since 1988. *See S.D. Warren Co. v. Paperworkers Local 1069*, 845 F.2d 3 (1st Cir. 1988). The Third Circuit, another appellate court highlighted by EACC, has only considered the matter three times and its most recent ruling upheld an award reinstating an employee. *Exxon Shipping v. Exxon Seamen's Union*, , 73 F.3d 1287 (3rd Cir.), *cert. denied*, 517 U.S. 1251 (1996).

Finally, the Fifth Circuit's resolution of these cases is consistent with other circuits in following a case-by-case approach. Although it refused in 1993 to uphold an award in *Gulf Coast, supra*, it recently reached a different result last year in *Atchison, Topeka and Santa Fe. Railroad Co. v. United Transportation Union (CT&Y)*, 175 F.3d 355, 358 (5th Cir. 1999) ("even if Santa Fe is correct that there is a well defined public policy against reinstating a drug user to a safety sensitive position in the railroad industry, the [award] in this case would not violate that policy"). In sum, there is no compelling reason to grant review.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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